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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 1002

HEINRICH C. HORN,
Petitioner,

vs.

CIA DE NAVEGACION FRUCO S. A. and J. R. ATKINS, d/b/a
ALABAMA FRUIT AND PRODUCE CO.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

HEINRICH C. HORN, Petitioner,
By JOHN H. TAPPAN,
510 Van Antwerp Building,
P. O. Box 2245,
Mobile, Alabama 36601,
Counsel for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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To the United States Court of Appeals for the Fifth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of Heinrich C. Horn, Petitioner, respectfully shows to this Honorable Court:

I.

EARLIER REPORTS.

A. This is a Petition to the United States Circuit Court of Appeals for the Fifth Circuit and specifically to its Opinion dated November 5, 1968. This Opinion is set out, in full, in Appendix A to this petition. This Opinion has not yet been reported.

B. The Court of Appeals Opinion of November 5, 1968, was preceded by that Court's Opinion of June 28, 1968. The Opinion of June 28, 1968, is set out in full in Appendix B to this Petition. The Opinion of June 28, 1968, has not been reported.

C. The Opinions of June 28, 1968 and November 5, 1968, result from cross appeals from an Opinion of the United States District Court for the Southern District of Alabama of September 14, 1964 and is reported in 233 F. Supp. at page 637. Said Opinion is set out, in full, in Appendix C to this Petition.

II.

JURISDICTION.

A. The date of the judgment sought to be reviewed is November 5, 1968, on which day it was entered.

B. The Opinion and judgment of November 5, 1968, is an Opinion resulting from cross-petitions for rehearing resulting from the opinion of the Court of Appeals of June 28, 1968.

C. This Honorable Court has jurisdiction under the terms of Section 1254 of Title 28, of the **United States Code.**

III.

QUESTIONS AT ISSUE.

As is set out more fully below, the controversies which are here presented arise out of the carriage of certain cargoes of bananas from Ecuador to Mobile, Alabama. The carriage of the bananas was in 1962 aboard the HEINZ HORN, owned by your Petitioner, while she was under charter to Cia de Navegacion Fruco (hereinafter referred to for convenience as "Fruco"), one of the respondents herein. Under the terms of said charter, the

HEINZ HORN performed a total of five voyages and the controversies involve cargo carried on the first and fourth of these voyages. (In addition, during the same time, the MARIE HORN, a sister ship of the HEINZ HORN, performed three voyages under the terms of a charter party with Fruco of substantially identical terms.)

The questions presented for review are as follows:

A. Was the Court below correct in concluding that Heinrich C. Horn (hereinafter referred to as "Horn"), Petitioner, failed to use due diligence to make the HEINZ HORN seaworthy at the start of the first voyage?

B. Was the Court below correct in concluding that Horn failed to carry his burden of proving an absence of causation between the unseaworthiness and the damage which resulted on the first voyage?

C. Was the Court below correct in concluding the faulty stowage, and the resulting loss of cargo, was the responsibility of Horn? Is the charterer, Fruco, not primarily liable?

D. Was the Court below correct in concluding there was no inherent vice or defect in the bananas carried on the fourth voyage of the HEINZ HORN?

E. Was the Appellate Court correct in reversing the District Court's conclusion that Horn is entitled to charter hire for the time the charterer placed the HEINZ HORN off hire after the first voyage?

IV.

STATUTES INVOLVED.

The case involves the Carriage of Goods by Sea Act, found in Title 46 of the **United States Code**, Sections 1300 to 1315. This Act is set out in full in Appendix D to this Petition.

It is thought that the Harter Act, found in Title 46 of the United States Code, Sections 190 through 195, is not actually involved in this case. However, as some comments refer to that Act; and as certain of the authorities cited by the Court below are dependent on that Act, it is set out in full in Appendix E to this Petition.

V.

STATEMENT OF THE CASE.

On April 30, 1962, Cia de Navegacion Fruco, S.A., entered into a charter of the HEINZ HORN, a German flag vessel, owned by Petitioner, using a New York Produce Exchange Charter Party. The charter contemplated the carriage of bananas from Ecuador to the Gulf Coast of the United States. The HEINZ HORN actually went on charter, under the terms of this charter, on the 3rd day of June, 1962, at Mayaguez, Puerto Rico.

Before leaving Mayaguez, the HEINZ HORN was surveyed by the German Lloyd's Society for her classification, and a new certification was issued dated June 3, 1962.

The HEINZ HORN (as is her sister ship, the MARIE HORN) is a small, two hold, refrigerated vessel, of 915 metric tons dead weight capacity, built in 1958 (four years before this controversy arose). She is capable of about 60 air changes per hour when the holds are empty, and of maintaining temperatures down to minus 20 degrees centigrade in all holds. Her refrig ration equipment is located in a refrigeration house between No. 1 and No. 2 holds, serving both of them. The method of distribution of the cold air consisted of forcing the air down through a canal to be distributed forward from the after bulkhead of the lower No. 1 hold and aft from the forward bulkhead of the No. 2 hold. The refrigerated air moved through the lower holds in opposite directions,

up into the tweendeck space and back to the bulkheads between the two holds where it was recooled or exhausted, as the case may be. The direction of the flow could be reversed and, on occasion, was.

There were distance thermometers located at different places in each hold which could be read in the engine room. In addition, there was a temperature gauge for reading the delivery air going into the holds; and two temperature gauges for reading redelivery air, coming out of the holds. These temperature gauges were regularly read (when the refrigeration was in operation) and the temperature readings were recorded both in a deck refrigeration log book, and in an engine room refrigeration log book. These readings and entries were made at least at hourly intervals during the carriage of bananas.

Furthermore, at least once each day, the pulp temperature of the bananas was taken. This was accomplished by a man going through the refrigeration house into the tweendeck space and the lower hold of each hold, immediately by the bulkhead between the two holds, which goes under the refrigeration house, and actually inserting a thermometer in a banana, and taking a reading after the temperature in the thermometer had been lowered to that of the pulp of the banana. These pulp temperatures were not recorded unless there was something unusual or out of the way about them, and there is no evidence to the effect that there was anything unusual about the pulp temperatures taken during the course of the voyage.

At the time the HEINZ HORN went on charter, her Master was Captain Horne (the Appellate Court spells this "Horn"; the similarity of name with Petitioner is coincidence); she had two mates, three licensed engineers and three junior engineers. The engineers operated the refrigeration machinery. Subject to the change noted

below, this was the officer situation on the vessel throughout the period of charter.

At the Canal Zone, en route to her first loading, the HEINZ HORN picked up a representative of respondents, Mr. Christian. Horne understood him to be a supercargo, and so carried him on the ship's articles. Subsequently respondents characterized him as an untrained observer. He remained aboard through the loading and the first voyage.

After the HEINZ HORN had loaded and was on her first voyage from Eucador to Mobile, Captain Horne became ill, and it was decided to take him off the ship, which was done at the Canal Zone. The voyage was completed from the Canal Zone to Mobile under the command of Mr. Schultz, who held a Captain's license. At Mobile, Captain Freytag met the vessel and took over the command. There is no evidence that the illness and subsequent absence of Captain Horne in any way contributed to the condition of the cargo as it was found on arrival in Mobile on June 21, 1962.

Before the HEINZ HORN arrived in Puerto Bolivar, she commenced pre-cooling her holds, and got them to about 42° F. According to the loading report submitted by Commercial Latino Americana, S. A., the shipper and stevedore, which acted for Fruco, loading started at 1950 on June 11; it stopped at 0230 of June 11 (this is probably a typographical error; we suspect this was June 12); and commenced again at 0835 of June 12 and continued thereafter until 0100 of June 13. Thus, more than half of the loading was done at night. According to this loading report, a total of 3,539 stems of bananas were loaded in No. 1 hold and 2,009 boxes of bananas were loaded in that hold; whereas, 11,366 boxes of bananas were loaded in No. 2 hold. This exhibit also discloses that the shipment was supervised by Mr. Turner, Manager; C. A. Margues, T., Chief Loading Officer; two selectors, two talleymen,

two weight checks, and one stowage supervisor. It further discloses, in detail, the location aboard the vessel in which the bananas were stowed by two gangs, totaling 100 men.

At the time of loading, bin boards, which had been in No. 2 hold were removed, although they were left in No. 1 hold. Mr. Schultz has said that he had had no experience with shipping bananas in boxes, though the vessel had often carried bananas in stems, and that the bin boards were removed (which ordinarily would separate the hold into smaller compartments) because this is the method customarily used by the charterer in carrying bananas in boxes as he was informed by Mr. Christian and the loading stevedores.

This is in line with the instructions given by the charterer in its letter of instruction of June 1, 1962, in which it is said:

> ". . . We have been loading these boxes in our own vessel, MARTHA ANNE, and our experience in carrying the fruit in boxes has been very good, therefore, you should have no difficulties providing you follow our instructions." (This letter, in full, is Appendix F to this Petition.)

The bananas were brought from the shore alongside the vessel in barges. From the barges, gangways were erected to the vessel; and on the vessel, into the holds. Men, carrying a box of bananas, would run up the gangway to the deck of the vessel, down a gangway into the hold, and stow the cargo. These were the 100 men in the employ of Latino Americana, the shipper and stevedore.

The HEINZ HORN sailed from Puerto Bolivar early on the morning of June 13, and except for the illness of Captain Horne, her voyage from Puerto Bolivar to Mobile was uneventful. The instructions of Fruco to de-gas the holds every six hours were followed. The HEINZ HORN

arrived in Mobile late on June 21 and discharging commenced at 8:00 on the morning of June 22, 1962.

The problem arose by reason of the cargo in the No. 2 hold. It is to be noted that all of the cargo in the No. 1 hold was accepted and sold. The cargo, in boxes (or cartons), in No. 2 were found to have a pulp temperature which, depending on the witness or the location of the banana, ranged from 56 to 62 degrees.

Mr. Schultz points out that in the boxes, packed before the boxes came aboard the vessel, there were ripe bananas in with green bananas.

The District Court found the HEINZ HORN seaworthy. It went on to conclude that the vessel failed to use due diligence to insure the safe carriage of the bananas in that the officers failed to cause the bananas to be stowed properly and failed to exercise due diligence in promptly pulling the air temperatures down and maintaining the delivery and return air temperature at the desired level. On these conclusions, the District Court allowed a recovery from Horn of $31,261.64 with interest.

In its decision of June 28, 1968, the Court of Appeals reversed the District Court's finding that the HEINZ HORN was seaworthy, finding that she was unseaworthy with respect to her crew, and, relying on this Honorable Court's decision in **May v. Hamburg Amerikanische Packetfahrt Aktiengesellschaft,** 1933, 290 U. S. 333, and its own decision in **The Framlington Court,** 69 F. (2d) 300, concluded it was not necessary to show causal relation between the defect (unseaworthiness) and the loss, and stated the effects of the improper stowage have no bearing on petitioner's liability in view of this determination. In the Appellate Court's revised opinion of November 5, 1968, the Appellate Court further concluded that Horn has failed to carry its burden of proving an absence of causation between the unseaworthiness and the loss. It further

concludes the primary cause of damage on the first voyage was the improper stowage of the bananas; that the ship's officers were acting for Horn, the Owner, rather than Fruco, the Charterer, in regard to decisions made touching this stowage. It affirms the District Court's conclusion of liability of petitioner.

On May 15, 1962, Fruco entered into an agreement to charter the MARIE HORN, a sister ship of the HEINZ HORN, also under a New York Produce Exchange Charter Party. The charter party for the MARIE HORN did not differ in any material respect from that for the HEINZ HORN.

The HEINZ HORN continued operating under the charter with Fruco for a total of five voyages (voyage here referring to a trip from Ecuador to Mobile with a cargo of bananas) and the MARIE HORN operated for a total of three voyages.

The only other voyage, of those just mentioned, from which claim arose for ripe or turning bananas, was voyage four, of the HEINZ HORN. There was involved here a shipment of 8,170 stems of bananas, a substantial portion of which were loaded after dark, aboard the HEINZ HORN on or about September 2, 1962 at Guayaquil, another loading port a short distance from Puerto Barrios, in Ecuador.

As to this voyage, the controversy touching loading or stowage does not exist. Evidence from the ship is to the effect that on the 2nd and 3rd day out of Guayaquil, on the way to Mobile, inspections were made in the tween-deck and lower holds of the vessel, and a total of 335 stems of bananas were found to be ripe already, and were jettisoned in an effort to prevent the ripening of other fruit.

On the vessel's arrival in Mobile, Mr. Atkins claimed some 56% of the bananas were ripe or turning. The Master issued a bill of lading without exceptions. At the trial,

a loading report, prepared by Frutera Ecuatoriana another shipper and stevedore in Ecuador, acting for Fruco, was introduced over objection. These constitute the only evidence introduced as to the good condition of the cargo on loading.

On this voyage, the delivery air reached 52° within eight hours after the hatches were closed where it remained. In this regard, reference is made to the letter of instructions from Fruco to the Master of the HEINZ HORN of June 1, 1962, Appendix F.

Again the District Court found that the HEINZ HORN was seaworthy. It further found there was no proof of inherent defect, quality, or vice of the cargo. It concluded the HEINZ HORN failed to use due diligence to insure the safe carriage of the cargo in that the officers failed to cause the bananas to be stowed properly and promptly to pull the air temperature down and maintain a delivery and return air temperature at the desired level. It concluded that Horn was responsible for damage in the amount of $18,495.73, plus interest.

In its opinion of June 28, 1968, the Court of Appeals affirmed the District Court's finding that the HEINZ HORN was seaworthy; it also affirmed the Court's finding that there was no proof of inherent defect in the cargo; it concluded the District Court erred in finding an absence of diligence in the stowage of the bananas; it concluded that the refrigeration clause, incorporated in the charter party, prevented a recovery from Horn on this voyage, and reversed the District Court's award of damages against Horn.

In its revised opinion of November 5, 1968, the Court of Appeals affirms its earlier decision in all respects except this: by reason of the incorporation of the Carriage of Goods by Sea Act in the charter party under the terms of the U. S. Clause Paramount, Cogsa has the effect of eliminating the refrigeration clause as a defense available

to Horn. It thereupon affirms the recovery the District Court allowed against Horn for the fourth voyage.

Following the discharge of the HEINZ HORN in Mobile on June 22, 1962, no orders were given for the sailing of that vessel until June 29, 1962, or which were effective until June 29. During this time the HEINZ HORN was drydocked and was on her owner's time for a period of just over a day.

The charterer viewed the HEINZ HORN as having been off hire for the entire period between June 22 and June 29 and deducted $4,327.73 from the charter hire of the HEINZ HORN. The District Court, after allowing the charterer a credit of $674.44 for the period the HEINZ HORN was drydocked, allowed the owner of the HEINZ HORN recovery of $3,651.29, plus interest, for this failure to pay charter hire.

Thereafter, when the HEINZ HORN arrived in Puerto Bolivar for her second voyage, the charterer placed the HEINZ HORN off hire for two more days because the vessel didn't arrive in time for loading and cargo was not ready at the time it arrived, because of this delay. The amount deducted for charter hire for this period was $1,266.66 at the rate of $633.33 per day. As it was the charterer, and not the owner who decided when the HEINZ HORN was to sail from Mobile, the District Court also allowed recovery of this charter hire withheld, plus interest.

The Court of Appeals in both its opinion of June 28, 1968, and its revised opinion of November 5, 1968, reversed the District Court. It grounded its reversal on Clause 15 of the charter party stating that the charterer is not liable for payment of hire for time lost from "deficiency of men", and that the time lost resulted from the delay in disposing of the damaged bananas, which in turn had been damaged by reason of inadequacy of personnel.

VI.

ARGUMENT.

A. 1. There is no support for the conclusion of the Court of Appeals that a vessel is to be deemed unseaworthy at the start of the voyage unless the owner insure that adequate and competent personnel will remain on board throughout the voyage. Such a conclusion is in direct conflict with the decisions of this Honorable Court, **Cullen Fuel Co. v. Hedger Co.**, 290 U. S. 82 (1933), and the decisions of other courts, **The Steel Navigator**, 23 F. (2d) 590 (2nd Cir. 1928); **Erie & St. Lawrence Corp. v. Barnes-Ames Company**, 52 F. (2d) 217 (W. D. N. Y. 1931).

2. (a) The Court of Appeals in concluding that the District Court erred in finding the vessel seaworthy reversed that Court when there was substantial evidence supporting the District Court's conclusion. **McAllister v. United States**, 348 U. S. 19.

(b) The evidence supporting the District Court is as follows: At the time of breaking ground, the HEINZ HORN had a Master, Captain Horne, and two Mates; she had three Engineers; and three Junior Engineers. The Engineers had the actual responsibility for operating the refrigeration machinery.

It is true that Captain Horne left the vessel at the Canal Zone on the voyage from Bolivar to Mobile, by reason of illness. Neither of the Courts below found he was ill at the time the vessel broke ground. In fact, Mr. Schultz, the only person who testified in regard to Captain Horne's condition, said the following:

> Q. "When you were asked about what his condition was or what was wrong when he left the ship at the

Canal Zone, you said that you didn't know, that you were not a doctor to diagnose the condition. Did he suffer from any illness at the time the cargo was being loaded while the vessel was in Puerto Bolivar?

A. "In Bolivar he was very healthy, and we were pleased because he was so good, because he was sick on previous voyages, not that he had to lie in bed, but he didn't feel well. Sometimes he had stomach pains and so on. In Bolivar he was really fine, he could eat everything and drink everything and was walking along the deck and looked very well.

Q. "Then he must have gotten ill between Bolivar and the Canal Zone.

A. "On the way to the Canal Zone he became seriously ill."

That the HEINZ HORN sailed with a Master and two Mates is consistent with the requirement of the law of the German flag under which she sailed. Attached, as Appendix G to this Petition, is a letter from the German Consulate General dated July 22, 1968, to Lamorte, Burns & Co., Inc., stating the applicable German Code requires a Master and only two Mates for a vessel of the class of the HEINZ HORN, together with relevant portion of the Code referred to and our translation.

The charter party of the HEINZ HORN states:

> ". . . the vessel is intended to be employed in the banana trade between good and safe port Ecuador . . . and safe ports US Gulf and/or US Atlantic."

This is the actual contract for the employment of the vessel. Nothing in the contract of hire for the vessel calls for the carriage of bananas "in boxes". As noted in the testimony of Mr. Schultz and Captain Freytag, this same vessel with the same personnel has quite successfully carried bananas on voyages approximately twice the length of the voyage contemplated here.

Thus, and with specific reference to the numbered items found by the Appellate Court, page A-15, Appendix A, the HEINZ HORN, at the time she broke ground in Bolivar:

(1) Had aboard a Master in good health;

(2) Had a normal complement of a Master, two Mates, three Engineers, three Assistant Engineers, as required by the applicable German law;

(3) Had aboard officers who had successfully carried bananas on voyages for twice the length here contemplated;

(4) After the Master left the vessel at the Canal Zone, had aboard not only two Mates, but three Engineers, and three Junior Engineers;

(5) The acting Master not only had prior experience as Captain of a refrigerated vessel, but had successful experience in the carriage of bananas.

3. That the HEINZ HORN was, in fact, seaworthy is shown by the fact that she did carry an acceptable cargo of bananas in her No. 1 hold; the same refrigeration machinery serving both holds and operated by the same personnel. This acceptable outturn of bananas from hold No. 1, on voyage one, refutes any conclusion that inadequate personnel was the cause of ripening bananas in No. 2 hold.

Captain Freytag, who joined the vessel at the time she arrived in Mobile completing her first voyage, and was present at the time the hatches were opened, said repeatedly that there was no question about the acceptable condition of the cargo in No. 1 hold.

All the other witnesses called, including Fruco's surveyor, the representative of the United States Depart-

ment of Agriculture and Mr. Atkins' employee entrusted with unloading the cargo, testified only as to the unacceptable condition of the cargo in No. 2 hold. Mr. Atkins' employee in fact testified as to the acceptable condition of the fruit stowed in both boxes and stems in No. 1 hold.

The significance of this uncontradicted testimony is that the HEINZ HORN, on the same voyage, using the same machinery and the same personnel, outturned a good cargo of bananas from hold No. 1, and ripening bananas out of hold No. 2. If the same personnel operate the same machinery on two holds at the same time, only one of which outturns unacceptable bananas, there must have been some cause other than personnel or machinery which brought about the ripening bananas.

B. Was the court below correct in concluding that Horn has failed to carry his burden of proving an absence of causation between the unseaworthiness and the cargo damage which resulted on the first voyage?

On the question of on whom rests the burden of proof of the cause of the damage, the Courts of Appeals are in conflict. In **The Oritani**, 40 F. (2d) 522; affirmed by adopting the District Court's opinion, 54 F. (2d) 1075, the Third Circuit Court of Appeals has held that the cargo libelant has the burden of showing that the unseaworthy condition is the proximate cause of the loss (40 F. (2d) p. 529). In the instant case, the Court of Appeals has stated that the shipowner has failed to carry its burden of proving an absence of causation between the unseaworthiness and loss.

Proof touching causation (or the lack of it) arises out of this: the HEINZ HORN on the same voyage, using the same machinery and the same personnel, outturned a good cargo of bananas from hold No. 1, and ripening bananas out of hold No. 2.

It is to be noted that there is no evidence in the record that the cargo carried in the No. 1 hold on voyage one was other than acceptable, and this includes evidence from the charterer and from the consignee.

C. Was the Court below correct in concluding the faulty stowage and resulting loss of cargo, was the responsibility of Horn, the ship owner?

This conclusion is in conflict with the conclusion reached by the Third Circuit Court of Appeals in **The Thomas P. Beal**, 11 F. (2d) 49. It is in conflict with decisions of the Second Circuit Court of Appeals: **Bull v. New York & Porto Rico S. S. Co.**, 167 Fed. 792; **American Tobacco Co. v. The Katingo Hadjipatera**, 194 F. (2d) 449, modifying the District Courts' decision in 81 F. Supp. 438, certiorari denied, 343 U. S. 978; and with numerous District Court decisions in the Second Circuit. See, e. g., **The Santona**, 152 Fed. 516, **Isbrandtsen Co. v. George S. Boutwell**, 1958 A. M. C. 351. It is incompatible with this Honorable Court's decision in **Oxford Paper Co. v. The Nidarholm**, 1931, 282 U. S. 681.

It is true the Court of Appeals in its decision of November 5, 1968, states the rule to be:

> "The Captain occupies a dual role with regard to such decisions. He acts for the ship owner where his stowage decisions are made with regard to the seaworthiness and safety of the vessel; he acts for the cargo owner where his decisions do not affect the seaworthiness or safety of the vessel, but affect the safety of the cargo only."

Petitioner does not find fault with the statement of the rule as set out by the Court of Appeals; the problem arises by reason of the failure of the Court of Appeals to apply the rule in this situation in which the stowage

of the cargo was concerned with the safety of the cargo only. It is difficult to conceive of a factual situation in which the second portion of the rule, aptly stated by the Court of Appeals, would have application if it does not have application to the situation here presented.

Admittedly, in the absence of contract, the ship owner is responsible for the cargo. Here the obligation properly to stow is placed on the charterer under the terms of Clause 8 of the charter party which is set out as Appendix H to this petition. To Appendix G, we add quotations from the opinions of Lord Atkin, and Lord Porter in the decision reached by the House of Lords in **Canadian Transport Co., Ltd. v. Court Line, Ltd.**, House of Lords 1940, A. C. 934, 64, Lloyd's Law List Reports 57. Here the House of Lords unanimously concluded that Clause 8 in a charter party there under consideration, identical in terms to the one which was a part of the charter party in the instant case, made the charterers, not the owners, financially responsible for damage to cargo resulting from faulty stowage.

In essence, the authorities cited on page 19 of this petition reach the same conclusion, usually by the device, first introduced by Judge Hough in the **Santona**, supra, of making the Master or officers of the vessel, the representatives or agents of the charterer under the terms of Clause 8 or similar charter party provisions, when they are making decisions with regard to the loading or stowing of the cargo which decisions are concerned with the safety of the cargo.

The Court of Appeals has concluded Fruco may have recovery of its loss to Atkins over against the vessel (on the theory that cargo may libel the vessel *in rem*). We agree with the Appellate Court that Atkins, as cargo owner, may bring its action against the HEINZ HORN *in rem*. However, this does not take into consideration

the fact that Fruco, as charterer, is a party to this action and may also be liable to Atkins, and its liability can be primary where as Horn's liability is only secondary.

This situation existed in the **Katingo Hadjipatera,** 194 F. (2d) 449, affirming 81 F. Supp. 438, certiorari denied 343 U. S. 978. The Court of Appeals in the **Katingo Hadjipatera** states the facts are sufficiently stated in the Opinion of the trial judge and, with the exceptions noted in the Opinion on appeal, the evidence amply supports his findings. Among the findings, not disturbed on appeal, or on certiorari, are the following:

> "SHIPOWNER'S CLAIM OVER AGAINST CHARTERER. It is indisputable that the charterer not only undertook the burden of stowage under the charter party, but actually performed that duty throughout. While the master retained an absolute right to direct stowage, for which he is, vis-a-vis third parties, always ultimately responsible, it is equitable that as between the charterer and the ship, the charterer should bear the loss. **Pioneer Import Corp. v. The Lafcomo,** supra, 138 F. 2d 907; **The Thomas P. Beal** (3 CCA), 1926 A. M. C. 438, 11 F. (2d) 49; see **Oxford Paper Co. v. The Nidarholm,** 282 U. S. 681, 685, 686, 1931 A. M. C. 522 . . ."

The Fifth Circuit has recognized the import of this rule in **Compagnie de Navigation, etc. v. United Mondial Corp.,** 316 F. (2d) 163, 5 CCA, 1963. Here the cargo owner was allowed to recover from the vessel *in rem,* but the Court went on to say:

> "If this judicial peril is more than the owner wants to bear, he can by contract as between himself and the user (charterer) shift the risk to a secondary one. See **American Tobacco Co. v. SS KATINGO HADJIPATERA** (2 Cir., 1951), 194 F. 2d 449, 1951 A. M. C. 1933."

D. The Court of Appeals has affirmed the District Court's statement that "there was no proof of inherent defect, quality or vice of the bananas" saying the carrier must have shown some defect, quality or vice adhering to the particular bananas brought aboard.

The only evidence showing the condition of the bananas on loading is the clean bill of lading signed by the Master. In turn, petitioner has shown that a substantial portion of the bananas were loaded at night when the light was inadequate to determine their color or firmness; that the shipper did not cut a banana from each stem to determine its softness, as was usually done; that on the second and third day after sailing, the vessel found it necessary to jettison a total of 335 stems of bananas because they were ripening too fast; that the delivery air into the holds where the bananas were carried reached 52° within the eight hour period where it steadied and remained for the balance of the voyage. (52° Fahrenheit is the lowest temperature permitted under the terms of the instructions from Fruco to Horn; it was achieved in a minimum of time which could be anticipated.)

In these circumstances, the lower courts were in error in placing the burden upon Horn to prove that there existed an inherent vice or defect in the cargo. In so doing, the lower courts are in direct conflict with contrary conclusions reached by the courts of the Second Circuit Court of Appeals: **The Niel Maersk**, 91 F. (2d) 932, 1937 A. M. C. 975 (2 CCA), certiorari denied sub nom, **Bradley v. Niel Maersk**, 302 U. S. 753; **American Tobacco Co. v. Katingo Hadjipatera**, 81 F. Supp. 438 (S. D. N. Y., 1948), modified on other grounds, 194 F. (2d) 449 (2 CCA, 1951), certiorari denied sub nom **American Tobacco Co. v. Hadjipateras**, 343 U. S. 978 (1952); **Hecht, Levis & Kahn, Inc. v. SS President Buchanan**, 236 F. (2d) 627 (2 CCA, 1956).

In essence the rule as stated by the Second Circuit in the foregoing cases is to the effect that, if the deterioration of the goods may have resulted from an inherent defect, the shipper has the burden of proving their good condition upon delivery to the carrier and to sustain that burden he must present some evidence beyond a clean bill of lading since the bill of lading is evidence only of the apparent or external condition.

This rule has also been followed in the Ninth Circuit Court of Appeals. See **Albers Bros. Milling Co. v. Hauptman,** 95 F. (2d) 286 (9 CCA, 1938); **Daido Line v. Thomas P. Gonzalez Corp.,** 299 F. (2d) 669 (9 CCA, 1962).

The Fifth Circuit Court of Appeals in **Compagnie de Navigation, etc. v. Mondial United Corp.,** 316 F. (2d) 163 (5 CCA, 1963), acknowledges the application of the rule, at least with regard to the produce or similar natural commodities, when it says:

> "Where because of the perishable or intrinsic nature of the commodity, the internal condition is not adequately revealed by external appearances, cargo may have a considerable burden of going further to prove actual condition . . ."

District Courts within the Fifth Circuit have applied the rule. See **Badrena e. Hijo, Inc. v. SS Rio Iguazu,** 182 F. Supp. 885, 1960 A. M. C. 2028 (District Court, Eastern District of Louisiana, 1960); **The St. Cuthbert; West Indies Food Importing, Inc. v. Cohana Shipping Corp.,** 1966 A. M. C. 1637 (District Court, Southern District of Florida, 1966).

In the face of this authority, and despite the evidence strongly indicating the bananas were already ripening at the time they were loaded, the courts below have concluded that Horn must fail because he has not carried his burden of establishing inherent vice in the cargo loaded.

E. Was the Appellate Court correct in reversing the District Court's conclusion that Horn is entitled to charter hire for the time the charterer placed the HEINZ HORN off hire after the first voyage?

Agreeing with the District Court in this regard, the Appellate Court said:

> "There is no doubt that the charter party provided that the ship sail on orders of the charterer."

It was because the charterer did not order the HEINZ HORN to sail from Mobile until June 29, 1962, that the District Court allowed Horn recovery of the charter hire withheld for the intervening period (less the time of dry-docking, admittedly at Horn's expense), plus the two day off hire time at Puerto Bolivar.

Although the record is replete with evidence of discussions; possibly even recriminations; between the parties, it is completely barren of evidence supporting the finding of the Appellate Court that the time lost in Mobile resulted from the delay in disposing of the damaged bananas, the basis for the Appellate Court's reversal of the District Court.

The conclusion of the Appellate Court is, therefore, in direct conflict with **McAllister v. United States**, 1954, 348 U. S. 19.

CONCLUSION.

As the situation now exists, under the terms of the New York Produce Exchange Charter Party, a form of charter quite common in usage among the shipping community, should cargo damage result from faulty storage, the vessel's charterer will bear the loss if the proceedings are brought within the area of the Second Circuit Court of Appeals; should it be presented within the area of the

Fifth Circuit Court of Appeals, the loss will fall on the shipowner.

In cases in which the question of inherent vice of the cargo is raised, the shipper of the cargo must produce some proof of the good condition of the cargo on loading, other than a clean bill of lading in the Second and Ninth Circuits; in the Fifth Circuit, the loss occasioned by cargo with inherent vice will fall on the shipowner unless he is able to prove the existence of the vice at the time of loading, a proof which, in the ordinary course of events, is quite beyond the shipowner's ability.

These are questions of importance both to the shipping and the insurance communities who are entitled to the benefit of this Honorable Court's conclusion with regard to them.

It is therefore respectfully requested that the writ herein prayed for be granted.

Respectfully submitted,
HEINRICH C. HORN,

By .....
JOHN H. TAPPAN,
His Counsel.